Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

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YICK MAN MUI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Whether the Petitioner was denied his right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution when his trial attorney conceded most of the government's case in his opening statement, failed to present a planned defense, failed to call the Petitioner as a witness, failed to conduct meaningful cross-examination of key government witnesses, misused evidence favorable to the Petitioner and failed to object to an erroneous jury charge?

2. Whether the government's overzealous rebuttal summation and personal vouching denied the Petitioner his right to due process of law under the Fifth Amendment to the United States Constitution and the right to a fair trial under the Sixth Amendment to the United States Constitution?

3. Whether the trial court denied the Petitioner his right to due process of law under the Fifth Amendment to the United States Constitution when it failed to properly instruct the and denied Petitioner's motion for a new trial without a hearing?

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In The

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October Term, 1997

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YICK MAN MUI,

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v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Yick Man Mui petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A, *infra*) is an unpublished summary order. The Decision of

the district court was read into the record (Appendix B, *infra*) and is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Introduction

The Petitioner, Yick Man Mui, was convicted in the United States District Court for the Eastern District of New York, after a jury trial, of crimes in aid of racketeering in violation of 18 U.S.C. § 1959 and sentenced to life imprisonment and a consecutive five year sentence for a related firearms charge in violation of 18 U.S.C. § 924(c).

The Petitioner's conviction was affirmed on appeal to the Court of Appeals for the Second Circuit (Appendix A, *infra*). There, the Petitioner argued that he had been denied effective assistance of counsel; was deprived a fair trial because of the prosecutor's improper comments during rebuttal summation; and that the trial court erred in its instructions to the jury.

In the instant Petition For a Writ of Certiorari, the Petitioner argues that the Court of Appeals for the Second Circuit erred when it held that the Petitioner was not denied the effective assistance of counsel even though trial counsel made numerous errors and conceded, during his opening statement, virtually every factual allegation

supporting the charges in the indictment.

The Petitioner also argues that a new trial should have been granted to the Petitioner when the attorney for the government repeatedly personalized and improperly vouched for the credibility of government witnesses during rebuttal summation by arguing that they (the Government's attorneys) would never risk their careers by calling untruthful witnesses.

Finally, the Petitioner argues that he is entitled to a new trial because the district court gave an erroneous instruction to the jury with respect to the gambling element of the Travel Act count in the indictment.

B. The Government's Theory And Proof At Trial

Petitioner was charged with the kidnapping and murder of Kenny Chung in aid of racketeering. The government presented its case primarily through the use of telephone records and the testimony of two cooperating witnesses: Chen Jian Bin a/k/a Kenny Chen and Ming Luong.

The government alleged that Petitioner was a member of a Tong, or Chinese gang, engaged in prostitution, extortion and illegal gambling. According to the testimony of cooperating witness Mike Ho, in June of 1993, Petitioner, who owned and operated a gambling parlor in Baltimore, discovered that a number of his customers, including Kenny Chung, were cheating and costing the gambling parlor thousands of dollars.

According to the testimony of the cooperating witnesses, Petitioner, as a member of the Tong, requested assistance from the New York branch of the Tong, in the form of men and firearms, to kidnap and beat the individuals who cheated his gambling parlor to teach them a lesson.

On or about July 3, 1993, Petitioner and others abducted Kenny Chung from the gambling parlor. Petitioner questioned Chung about his partners and Peter Jai hit him with a baseball bat. Petitioner told Chen to bring Chung to New York. Chung was put into a car with Ming Luong, Peter Jai and Ah Dai. Instead of being brought to New York as Petitioner had requested, Chung was shot and killed by Peter Jai. Chung's body was discovered on the side of the road by the Maryland State police in the early morning hours of July 4, 1993. Ming, Jai and Ah Dai returned to Petitioner's apartment and reported that Chung was dead. Ming and Ah Dai where each paid $1,000 while Jai fled the United States with the aid of Petitioner and Chen.

No defense was presented.

C. Petitioner's Motion For A New Trial

Prior to sentencing, on January 15, 1997, Petitioner retained new counsel and moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. In his motion, Petitioner argued that his trial counsel was ineffective; that the government's rebuttal summation constituted reversible error and that the trial court improperly restricted defense counsel's summation. The

Rule 33 motion was denied on April 10, 1997 without a hearing (*see* Appendix B). The District Court summarily concluded that trial counsel had been effective and that the court's instructions cured any defects in the government's rebuttal summation. Petitioner was sentenced to life imprisonment and a consecutive five year term of imprisonment for the gun conviction.

REASONS FOR GRANTING THE WRIT

This case impacts the Petitioner's constitutional right to a fair trial in several respects. First, trial counsel deprived Petitioner of effective assistance of counsel when he conceded Petitioner's guilt in his opening statement, promised a defense in his opening statement which was never presented to the jury, denied Petitioner's right to testify even though in his opening statement he promised the jury that Petitioner would testify, failed to prepare and utilize phone records to discredit key prosecution witnesses, and failed to object to an erroneous jury charge. The trial court's decision to deny Petitioner a new trial was particularly egregious because the court refused to grant a hearing even though Petitioner raised factual issues that were outside of the record.

Second, the attorney for the government denied Petitioner's right to a fair trial when he impermissibly and personally vouched for his own integrity as well as the credibility of the government's cooperating witnesses. Specifically, the government's attorney repeatedly characterized Petitioner's attack on the credibility of the government's witnesses as a personal attack upon *his* integrity despite several admonitions from the court not to

personalize the case. Furthermore, the government's attorney implied to the jury that the agents' and his own personal career would be jeopardized if the jury were to acquit the defendant. Indeed, even though the Second Circuit Court of Appeals ultimately held that no error had occurred during summation, the court nonetheless stated that "[t]he prosecutor came close to provoking reversible error by repeatedly inserting his personal situation and interests in his summation." (*See* Appendix A at page A2).

Third, the trial court erred when it failed to charge the jury on the elements of gambling activity under Maryland state law. This instruction is required by the Travel Act statute Petitioner was charged with (18 U.S.C. § 1952(a)(2)(b)). Further, this case should, at the very least, be remanded to the district court for a hearing so that the Petitioner may develop the record with respect to some of his ineffective assistance of counsel claims.

This Court should review this case because each of these grounds involve the interpretation of critical rights under the Fifth and Sixth Amendments to the Federal Constitution and the statutory construction of the Travel Act.

POINT I

THE COURT OF APPEALS FOR THE SECOND CIRCUIT ERRED WHEN IT OVERLOOKED PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

This Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984) requires a defendant making an ineffective assistance of counsel claim to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Further, the defendant must show that the deficient performance prejudiced the defense. *Id.* A defendant may establish "deficient performance" by showing trial counsel's "representation was unreasonable under the prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 381-82 (1986). Prejudice to the defendant is demonstrated where deficient performance is shown, and "there is a *reasonable probability* that but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. at 694 (emphasis added).

This Court has reviewed denial of claims of ineffective assistance of counsel particularly where, as here, "the Court of Appeals *overlooked* evidence strongly supporting" the ineffectiveness claim. *Burden v. Zant*, 510 U.S. 132 (1994)(emphasis added). Here the Court of Appeals for the Second Circuit completely "overlooked"

and simply did not comment on the multiple ineffective assistance grounds raised by Petitioner.

A. Counsel's Concession of Guilt During Opening Statement Prejudiced Petitioner.

Petitioner's trial counsel, in his opening statement, conceded virtually all of the facts alleged by the government supporting the kidnapping, conspiracy, and murder charges. Specifically, counsel admitted that Petitioner was a member of the Baltimore Chinese Freemasons, the alleged Tong, and that he operated an illegal gambling parlor. Counsel also provided a motive to injure the victim by stating that Petitioner was being cheated out of money by the victim at the gambling parlor. Thus counsel conceded that Petitioner was part of the alleged enterprise, knew the victim, and had a motive to harm or intimidate him.

Counsel also affirmatively linked the Petitioner to co-defendant Kwok who had a criminal history involving narcotics, acts of extortion and other acts of violence and he connected Petitioner to the others involved with the murder and kidnapping including Peter Jai and Ming Luong and Ah Dai. Most significantly, counsel's opening statement placed Petitioner in conspiratorial meetings with these individuals.

These admissions removed the government's burden to prove Petitioner's guilt beyond a reasonable doubt and prejudiced the Petitioner in a case where the evidence was not overwhelming. Indeed, the telephone records in this case merely showed that Petitioner was in

the Baltimore area in late June and early July, 1993. These records do not prove that any conversations took place between the alleged co-conspirators or that Petitioner attempted to call the co-conspirators or that Petitioner was in Baltimore when one of the co-conspirators called him. Thus, had counsel not admitted to the aforementioned facts, the only evidence against Petitioner would have been the impeachable testimony of cooperating witnesses.

Because an admission by a defense attorney in his opening statement in a criminal case eliminates the government's burden on a given element of the offense, *see United States v. McKeon*, 738 F.2d 26, 29 (2d Cir. 1984); Fed. R. Evid. 801(d)(2)(B), and there was a substantial lack of direct evidence connecting the Petitioner to the victim, counsel's admissions cannot be deemed to have been the product of a sound trial strategy. Incredibly, counsel went as far as saying "is [the Petitioner] guilty of any of these crimes? Perhaps." Significantly, since a co-conspirator who does not commit the substantive offense is liable for it as if it were committed in furtherance thereof, counsel's admissions regarding the conspiracy were devastating. *See Pinkerton v. United States*, 328 U.S. 640 (1946). There can be no question that counsel for Petitioner ensured a conviction on the substantive counts by *conceding* the conspiracy *and* the foreseeability of the kidnapping and murder.

Moreover, given that several of the charges in the indictment, such as Count Eight charging Petitioner with kidnapping in aid of racketeering, carry a life sentence, the prejudicial effect of counsel's admissions cannot be

understated.

Thus, counsel relieved the government of its burden by admitting that victim Chung had cheated the Petitioner, that Petitioner spoke with co-defendant Kwok about the cheating, that Petitioner met with Kwok one week before the murder and that Petitioner was present at the scene of the kidnapping. All of these admissions lent credibility to the testimony of the government's witnesses before they even testified.

B. Counsel's Failure to Present A Promised Defense Prejudiced Petitioner.

In his opening statement, counsel promised the jury that Petitioner would be presenting a defense at trial. Counsel stated that Petitioner would testify for the purpose of establishing his state of mind and his legitimate position in the Baltimore Chinese Freemasons. When Petitioner failed to testify, counsel's promise to the jury of an explanation from Petitioner was broken. Counsel recognized his error and attempted to mitigate the damage in his closing by stating "[a]nd if you want to blame somebody for making statements which I did not put into evidence to support in my opening statement, blame me." However, this only reinforced the fact that counsel had promised a defense and had presented none. This failure to present a promised defense prejudiced the defendant because it is reasonable to conclude that the result may have been different if a defense had been presented as promised. *See Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990)(failure to present a defense fell outside the wide range of professionally competent

assistance); *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988)("[L]ittle is more damaging than to fail to produce important evidence that had been promised in an opening."); *accord, United States v. Maldonado*, 115 F.3d 9, 14-16 (1st Cir. 1997).

C. Petitioner Was Denied His Right To Testify.

In an affidavit presented in his Rule 33 motion to the district court, Petitioner states that he was denied his right to testify by his own counsel. Because the district court denied Petitioner's motion for a Rule 33 hearing, this affidavit is relied upon here to assert this argument based upon events that took place off the record.

A defendant has an absolute right to testify at his trial. *Rock v. Arkansas*, 483 U.S. 44 (1987). Here, Petitioner was denied this fundamental right when his lawyer unilaterally decided that Petitioner would not testify because to do so would guarantee a conviction. Counsel told Petitioner that if he testified he would be discredited in cross-examination because of his prior bad acts consisting of credit card fraud where no conviction was ever obtained. Since there were no prior *convictions,* it is likely that Rules 404(b) and 608(B) of the Federal Rules of Evidence would have precluded the government from inquiring about these acts on cross-examination. Moreover, counsel could have simply requested a ruling from the district court on these prior acts before advising Petitioner not to testify. This error was exacerbated by counsel's promise in his opening statement that Petitioner would testify at trial.

Counsel also failed to investigate whether the character witnesses suggested by Petitioner could have assisted a defense if Petitioner testified. Petitioner had provided a list of names to counsel of individuals who agreed to testify to Petitioner's character but counsel never contacted them. Thus, counsel's determination that Petitioner should not testify was flawed and the result of a lack of preparation.

D. Counsel Failed to Properly Cross-Examine Key Government Witnesses.

During his cross-examination of Chen, counsel was ineffective because he failed to utilize certain phone records introduced at trial by the government. These phone records showed that Chen made several phone calls to Petitioner's beeper number throughout the early morning hours of July 4th, 1993 shortly after the murder took place. This evidence was crucial impeachment material for use against Chen who testified that he was with Petitioner when the calls were made. The obvious question is: why would Chen beep Petitioner if Chen was with Petitioner when the beeps were made? Counsel completely ignored this inconsistency.

The phone records also indicate that no return calls were made after Petitioner was paged by Chen. Further, the records showed that several phone calls were made from the Washington D.C. area on July 4th, 1993 even though Chen claimed he had returned to New York.

The cell phone in question was registered in Chen's girlfriend's name but Chen's testimony makes it

abundantly clear that it was his phone. Chen testified that he used the phone both on his first trip to Baltimore and throughout the month of July, 1993. Moreover, it was the government's position that it was Chen's phone and that he used it the night of the murder.

Chen testified that after assaulting Chung and the others drove away with Chung to kill him, he went with Petitioner to dispose of Chung's car. Chen and his girlfriend then went with Petitioner to stay at his apartment all night and into the morning. There was simply no reason for Chen to have been calling Petitioner on his cell phone if he was with him in his apartment. Counsel failed to use these telephone records to expose this critical inconsistency in Chen's testimony.

Unfortunately for Petitioner, because counsel conceded in his opening statement that Chen was with Petitioner in late June, 1993 and July 3rd to 4th 1993 and that Petitioner was present during the commission of the charged kidnapping, counsel trapped himself by his admissions and was unable to exploit this inconsistency.

Counsel made matters worse when he later argued to the jury that anyone could have used the cell phone even though the government was arguing that it was Chen's phone and that Chen was the one who used it during the critical time periods. Had counsel effectively used the phone records there is a reasonable probability that the jury would have discredited Chen's testimony and acquitted Petitioner.

Additionally, counsel was ineffective because he

never obtained telephone records for the night of the murder to determine whether Chen had called co-defendant Kwok on the night of the murder. Because these issues are outside of the record, however, Petitioner's motion for a Rule 33 hearing should have been granted for further factual development.

E. Trial Counsel Failed to Object to Erroneous Jury Charges

Compounding his other errors at trial, counsel failed to object to erroneous jury charges. Counsel failed to object to the court's instructions on counts five and six of the indictment charging Petitioner with violating the Travel Act, 18 U.S.C. § 1952(a)(2)(B). Whether the alleged gambling activity was "unlawful activity" under the laws of the State of Maryland, was an element on which the jury should have been instructed. *See United States v. Jones*, 909 F.2d 533, 539 (2d Cir. 1991); *see also United States v. Kahn*, 472 F.2d 272 (2d Cir. 1973). Counsel wholly failed to recognize this and permitted the court simply to label the gambling activity as unlawful. This had the prejudicial effect of allowing the jury to find guilt without deciding on an element of the crime charged.

Counsel's failure to object and propose proper instructions was inexcusable and denied Petitioner his constitutional right to have a jury determine whether the government had met its burden of proof on all the elements of the charged crimes. Counsel also failed to object to the court's conspiracy charge. Specifically,

counsel failed to request a charge that mere presence and association with conspirators is insufficient evidence to find a defendant's participation in that conspiracy. Here, counsel's defense did not dispute that Petitioner knew and associated with his co-defendant and the other participants, however, this mere association was not evidence of his participation in the conspiracy to kidnap and murder Kenny Chung.

POINT II

THE GOVERNMENT'S REBUTTAL SUMMATION DENIED THE PETITIONER A FAIR TRIAL.

In its Summary Order, the Court of Appeals for the Second Circuit conceded that the propriety of the government's rebuttal in this case was a close questio and stated that "[t]he prosecutor came close to provoking reversible error by repeatedly inserting his personal situation and interests in his summation." *See* Appendix A at page A2. The district court noted, in denying Petitioner's Rule 33 motion, that it "did think that the prosecutor's remarks were intemperate and improper. . . " *See* Appendix B at page B2.

Here the government's attorney repeatedly personalized and vouched for his own integrity and those of his colleagues in the government. The government did this despite several objections by trial counsel and a number of admonitions from the district court. Shortly into the rebuttal summation the prosecutor made the following sarcastic comments:

> After listening to what we all listened to this morning, I think all of you, based upon what [trial counsel] Mr. Pokel said, expect an apology. This is all a mistake, all the work we did, everything we did in this case.
>
> ***
>
> We really got it wrong here, ladies and gentlemen. I guess I should be sorry, we should all be sorry.
>
> ***
>
> Depending on how charitable Mr. Pokel is, we're either idiots dopes or liars.

The court sustained each of the objections to these comments and warned the government not to personalize the case but the prosecutor continued:

> What they have told you was, this was all a plot to get the big fish ladies and gentlemen. The government was shooting for big game in this case, big game. The defendant Kwok, a gambler from Maryland and that the agents, the prosecutors would risk their career to put on.
>
> ***
>
> I got a sense, listening to Mr. Pokel's summation here, that what happened was, we would put the witness on the stand. There would be a dark cloud that rolled in, and you would not hear anything.

***

> Mr. Pokel didn't suddenly shine a bright light on this. He just dragged it out, that's what he did.

***

> . . . I argue to you that the defendants chose these witnesses, we didn't. They argue to you that. . .
>
> . . .If we could call priests, nuns, rabbis, don't you think we would?

Even after a sidebar conference where the court specifically warned the prosecutor that he was vouching for the credibility of the government's witnesses, the prosecutor continued to personalize his summation:

> Now look at the evidence in this case. What do we have ladies and gentlemen? We have mountains of evidence connecting the defendant to these crimes. First we have Robert McKinney. . . How else do we know that. . .

After the summations were completed, defense counsel moved for a mistrial based upon the prosecutor's comments about defense counsel's opening statement. The district court denied the motion but stated to the prosecutor: "If you have problems on this case, it will be because of some of the comments that you made in your rebuttal". The defense counsel moved for a mistrial based upon the government's vouching during the rebuttal

summation. This application was also denied because the court believed that it had cured the impropriety with its admonitions. Significantly, however, the *district court never gave a curative instruction to the jury specifically addressing the prosecutor's improper comments.*

Again at sentencing, the district court stated that ". . . if there is a problem with this case on appeal, . . ., it will be because of these comments made by the government [during rebuttal summation]". *See* Appendix B at page B2. Thus, while the district court was clearly troubled by the comments made by the prosecutor, it left the issue to the Court of Appeals.

This Court has defined a prosecutor's role as being:

> . . .the representative not an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is, in peculiar and very definite sense, the servant of the law. The twofold or innocence suffer. He may prosecute with earnestness and vigor indeed, he should do so. But, while he may strike a hard blow, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1934).

Here the government argued to the jury that neither the Assistant United States Attorneys nor the agents assigned to the case would risk their careers to convict the Petitioner. Thus, the government was implying that they, the government's lawyers, *knew something that they didn't and the jury should trust them.* Moreover, the prosecutor implied that by acquitting the Petitioner, the jury would destroy the careers of the agents and prosecutors.

The district court's mere sustaining of objections and failure to give a specific curative instruction was insufficient to correct the compounded errors. *See generally*, *United States v. Espinal*, 981 F.2d 664, 667 (2d Cir. 1992); *United States v. Friedman*, 909 F.2d 705, 710 (2d Cir. 1990).

In sum, in this case the evidence of guilt was not overwhelming. The case rested solely on the credibility of Kenny Chen and Ming Luong. Without any direct evidence linking Petitioner with the crimes, the government bolstered the credibility of its cooperating witnesses by vouching and personalizing in the rebuttal summation. Therefore Petitioner's convictions should be reversed because he could not have gotten a fair trial given the improper summation and because the district court abused its discretion when it denied Petitioner's Rule 33 motion.

POINT III

THE DISTRICT COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE ELEMENTS OF THE ALLEGED STATE LAW UNLAWFUL ACTIVITY AS REQUIRED BY THE TRAVEL ACT.

When instructing the jury on the elements of 18 U.S.C. § 1952, the district court failed to instruct the jury that they must find a violation of state gambling laws to convict under § 1952. Instead, the court simply told the jury that "gambling is an unlawful activity within the meaning of the Travel Act." However, § 1952(a)(2)(b) states that

> "unlawful activity" means (1) any business enterprise gambling. . . in violation of the laws of the state in which they are committed. . .

It is the Judge's responsibility "to provide the jury with sufficient instruction to enable it to assess the evidence within the proper legal framework and to reach a rational verdict." *United States v. Parker*, 903 F.2d 91, 191 (2d Cir.), *cert. denied*, 498 U.S. 872 (1990). Without any guidance as to what kind of gambling activity is unlawful under Maryland law, the jury was not given the proper legal framework and could not have determined whether Petitioner violated the Travel Act. *See United States v. Nardello*, 393 U.S. 286, 295 (1969) (the activity charged must be unlawful in that particular state).

Since not all gambling activity is illegal in all states, the district court's failure to instruct the jury on

Maryland law relieved the government of its burden to prove "unlawful activity" beyond a reasonable doubt. Here, the government presented gambling paraphernalia as evidence of gambling activity but never proved that possession of these items was a violation of Maryland state law. In fact, the government in its summation simply stated that the gambling activity was illegal because Petitioner's attorney admitted this in his opening statement.

Conclusion

For The Reasons Stated, This Court Should Grant The Petition For Certiorari To Consider The Important Questions Presented.

DATED: New York, New York
August 14, 1998

Respectfully submitted,

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No. _____

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YICK MAN MUI,

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UNITED STATES OF AMERICA,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

SW

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Appendix A
Summary Order of Affirmance of the United States of Court of Appeals for the Second Circuit, Decided May 21, 1998 [Pages 1a – 3a]

United States of America, Appellee, v. Yick Man Mui, also known as "Ah Man", and Koh Fook Kwok also known as "Uncle Kwok", Defendants-Appellants.

Docket Nos. 97-1249, 97-1308

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

May 21, 1998, Decided

PRESENT:

LEVAL, CABRANES, Circuit Judges, BRIEANT, District Judge sitting by designation.

SUMMARY ORDER

Appeal from the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that

Appendix A
[Summary of the USCA for the Second Circuit]

the order of the District Court be and it hereby is *AFFIRMED.*

Defendants Mui and Kwok appeal from judgments of conviction entered following a jury trial. Defendants were convicted principally of violent crimes in aid of racketeering, in violation of 18 U.S.C. § 1959. Defendants contend, *inter alia*, that the government's summation included improper remarks that require reversal, and that, by sustaining improper government objections, the court unfairly limited the scope of defendant Kwok's summation. Although the first question is a close one, we reject both contentions.

The prosecutor came close to provoking reversible error by repeatedly inserting his personal situation and interests in his summation. For example, the prosecutor invoked "all the work we did, everything we did in this case" and suggested that the government agents and prosecutors would not "risk their careers" to bring a fabricated case against the defendants. Because the prosecutor's remarks appear to have been provoked by defense counsel's suggestion that the prosecutor personally solicited perjury and because we think the remarks had no effect on the jury's verdict, we find no reversible error. *See United States v. Germosen*, 139 F.3d 120, 1998 WL 100545, *8 (2d Cir. Mar. 6, 1998).

The district court did not unfairly limit the summation given by the attorney representing defendant Kwok. *Cf. United States v. Salazar*, 485 F.2d 1272, 1279 (2d Cir. 1973)(the district court was within its discretion

in limiting appellant's summation to forty-five minutes, the same time allotted to the government). The court gave Kwok's attorney ample opportunity during his nearly two-hour long summation to argue that the government had not put forward sufficient credible evidence of guilt. Specifically, the court did not abuse its discretion when it foreclosed defense counsel's argument that there was no evidence Kwok had received extortion money because the record was to the contrary. Defense counsel's argument that no evidence showed Kwok lived a lavish lifestyle was not contrary to the record, but the court's ruling precluding argument to this effect was within its discretion.

We have considered defendants additional arguments and find them to be without merit.

We therefore *AFFIRM* the judgment of District Court.

Appendix B
Decision of the United States District Court for the Eastern District of New York, Read into the Record on April 10, 1997 [Pages 4a – 6a]

DOCKET No. 95 CR 0766

United States District Court

For the Eastern District of New York

Hon. Sterling Johnson, Jr. (USDJ)

—♦—

UNITED STATES OF AMERICA,

-against-

YICK MAN MUI,

THE COURT: All right. This is on for sentencing; however, the defendant has a motion. He states two grounds. One is the ineffective assistance of counsel; and two, the Government's improper summation. Is that correct?

Appendix B
[Decision of the USDC for the Eastern District of New York]

THE COURT: With respect to the ineffective assistance of counsel, I'm going to read this into the record.

> "The standard for ineffective assistance of counsel is two pronged: one, that the defendant must show that counsel's performance fell below objectively reasonable standards of performance under prevailing professional norms, and there is a strong presumption of adequate assistance. And a defendant must show reasonable probability that the result would have been different but for those errors. A strong government case militates against the court finding prejudice resulting from defense tactics."

I tried this case, and I find that the defendant has not met these standards. There might be a difference with respect to tactics that were used or not used, but the conduct that I observed was not ineffective assistance of counsel; so therefore I am denying that motion.

With respect to the prosecutor's improper remarks on summation, I did think that the prosecutor's remarks were intemperate and improper; however, at the trial, I did caution the jury that whatever [sic] lawyers said was not evidence in the case, and frequently during the prosecutor's comments I issued curative instructions.

Appendix B
[Decision of the USDC for the Eastern District of New York]

I also put on the record that if there is a problem in this case on appeal, should there be a conviction, it will be because if these comments by the government.

For that reason, I am denying the defendant's motion for a new trial.

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MR. CURRAN: Judge, not on the sentence but on the motions. One of the arguments that Mr. Mui set forth to your Honor was his failure to testify. I assume that that is also subsumed in your decision.

THE COURT: That is incorporated in the ineffective assistance of counsel. I referred to that when are [sic] I mentioned tactics. It was up to the lawyer and the defendant to determine whether he was going to testify or not, and the lawyer and the defendant chose no to put him on the stand. This was a tactical decision made by counsel, and because that decision was made, that is not, in and of itself, in effective assistance of counsel. So when I referred to tactics, I was referring to him testifying or not testifying.